Filed 10/4/10 P. v. Ariza CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO ARIZA, Defendant and Appellant.	B215199 (Los Angeles County Super. Ct. No. TA098215)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald V. Skyers, Judge. Affirmed in part and reversed in part.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged defendant Alejandro Ariza and co-defendant Eduardo Velasco ("co-defendant") with first degree murder and attempted premeditated murder. The information also included weapons and gang allegations. Defendant and co-defendant went to trial together, but each had a separate jury. Co-defendant is not a party to this appeal.

Defendant's jury found him guilty as charged and found true all special allegations. On appeal, defendant argues the trial court made multiple reversible errors, including (1) failing to instruct the jury on either imperfect or perfect self-defense, (2) admitting irrelevant and prejudicial evidence, and (3) failing to hold a *Marsden* hearing. Defendant also claims the judgment must be reversed because of statements the prosecutor made to the jury in closing. Finally, defendant argues either the trial court never made a restitution order for payment of the victim's funeral expenses, or, if it did, that order must be reversed.

We agree with defendant that the restitution order, assuming it was entered, must be reversed and we remand the case on that issue. As to defendant's remaining claims, however, we disagree. Finally, as respondent correctly points out, the sentence on count two must be corrected.

Background

Evidence presented to Defendant's jury.

1. The Gangs

The Paramount Locos and the Compton Barrios Segundos are rival gangs in the city of Paramount. Both gangs frequent the intersection area of Orange Avenue and Rosecrans Boulevard, near the Jack's Jug Liquor store. The shooting around which this case revolves occurred on Orange Avenue near that intersection.

Defendant is a member of the Paramount Locos gang—a violent gang that commits assaults with deadly weapons, attempted murder and murder.

The victims Luis Rodriguez and Ivan Torres were members of the Compton Barrios Segundos.

2. The Shooting

On the evening of October 27, 2007, Luis Rodriguez was shot and killed on the sidewalk of Orange Avenue, near Rosecrans Boulevard.

Manuel Magana saw the shooting from his home on Orange Avenue. Just before the shooting, Mr. Magana heard loud talking and looked outside. He saw three men standing on the sidewalk outside his house and two men in a four-door, Dodge Intrepid stopped in the middle of the street. It appeared the men in the car were talking to the men on the sidewalk. The driver of the car was Hispanic, with a mustache and goatee, and was wearing a black Los Angeles Dodgers hat with a black "L.A." emblem outlined in white. The passenger was also Hispanic and wearing a baseball hat. Mr. Magana did not know any of them.

Mr. Magana turned back to what he had been doing, but a few seconds later heard gunshots. He again looked outside and saw the driver of the car holding a rifle, shooting at the three men on the sidewalk. Mr. Magana heard about six gunshots, all of which seemed to come from the same gun. He did not see any of the men on the sidewalk shooting back at the car. They were trying to get away.

Mr. Magana "secur[ed his] family" then looked outside again. This time he saw one of the three men from the sidewalk hiding in his neighbor's parking lot holding a gun. Another of the three men collapsed in a neighbor's driveway. The car was still stopped in the street. Eventually, the man who had been hiding and holding a gun and the third man, who was on a bicycle, fled. The man on the bicycle was not holding a gun. At some point the car also left. Mr. Magana did not see the man who was hiding or the man on the bicycle take anything from or try to help the man who had collapsed, although he heard the one on the bicycle scream, "Did they get him?" When the one man collapsed, he had nothing in his hands.

Mr. Magana could not remember the exact color of the Dodge Intrepid. At the preliminary hearing, he said it was a brownish or light brown metallic color. In his police interview, he said he thought the car was light green. He did remember it had tinted windows, but it did not have rims. At trial, he was shown a photograph of a Dodge

Intrepid, which Mr. Magana said appeared to be or was similar to the one he saw the night of the shooting.

Jorge Rodriguez also lived on Orange Avenue at the time of the shooting. He had just driven home from work, had pulled into his driveway and was opening the door to his car when he heard more than six gunshots and saw two men running on the sidewalk across the street. He had just seen the two men, and others, in the parking lot of Jack's Jug Liquor as he drove by on his way home. One of the men fell and the other tried to pull him into a driveway. The one who was still standing began jumping and saying something unintelligible, then ran off. The man who ran away held something silver in his hand. Mr. Rodriguez thought it was "[p]robably [a] knife or something like that." He did not see the man who ran away take the silver object from the man who had collapsed and he did not see anything in the collapsed man's hands.

Cesar Torres and his girlfriend Vanessa Botello lived near the scene of the shooting. Ms. Botello had known co-defendant since elementary school. And Mr. Torres had known defendant and co-defendant for about three to six months, but did not know them well. He knew they were both members of the Paramount Locos gang with the monikers "Minor" (for defendant) and "Wino" (for co-defendant). Mr. Torres is not a gang member.

On the night of the shooting, co-defendant stopped by Mr. Torres's home unannounced while Mr. Torres and Ms. Botello were either making or eating dinner. Ms. Botello answered the door, then got Mr. Torres. Although Ms. Botello remembered little at trial, she had previously spoken with detectives, telling them she overheard co-defendant talking to Mr. Torres. According to Ms. Botello, co-defendant was "more or less bragging about killing somebody" and said defendant had shot someone. Ms. Botello did not want to hear any more and walked away. At trial, she did not remember hearing co-defendant say anything.

Co-defendant and Mr. Torres spoke outside, near the street, for about five to ten minutes. During their conversation, a helicopter was overhead and co-defendant joked the helicopter was looking for him. He told Mr. Torres he and defendant had been riding

around and had "got into it verbally" and "exchanged words" with some "guys on Orange" who had been walking near Jack's Jug Liquor, "waving" and "saying Segundos." Co-defendant said they had "'beefed it'" and "'handled it.'" Mr. Torres explained that "beefed it" meant they were rivals or did not get along, and "handled it" meant they "exchanged words and left nothing unsaid." Neither phrase meant there had been a shooting. While they spoke, Mr. Torres saw a silver Intrepid parked in front of his house and was "pretty sure" defendant was in it, although he could not see him. Co-defendant told Mr. Torres it was defendant's car, which Mr. Torres had previously seen defendant driving.

Mr. Torres did not want to participate in the investigation or testify at trial. He did not want to put his family in danger. Detectives showed Mr. Torres photographic lineups, from which he was able to identify both defendant and co-defendant. Ms. Botello also identified defendant and co-defendant from photographs shown to her by detectives.

3. The Investigation

a. The crime scene

Officers found five .22-caliber shell casings in the middle of Orange Avenue, just north of where Luis Rodriguez collapsed, and another .22-caliber shell casing nearby. A .22-caliber firearm had been used, but no weapons were found at the scene.

A security video from Jack's Jug Liquor showed the victims Luis Rodriguez and Ivan Torres inside the store just before the shooting. Ivan had some sort of verbal altercation with three other men, none of whom could be identified.

b. The autopsy

An autopsy revealed Luis Rodriguez died of a gunshot wound to the chest. The fatal bullet followed a downward trajectory, which the coroner indicated would mean the shooter was somewhat higher than the victim. The coroner explained, however, that, if the shooter were sitting in a car and the victim were on the sidewalk, the trajectory would still make sense if the victim bent over in an attempt to escape the shooting.

c. The Fresno search

Almost two months after the shooting, officers searched defendant's bedroom in his home in Fresno. Among other things, the officers found a black Los Angeles Dodgers hat with the letters "PM" embroidered on the side, a belt with a "P" on the buckle, and a piece of paper with "Minor" and various letters written on it. At trial, an officer explained the "PM" and "P" are abbreviations Paramount gangs, including the Paramount Locos, use.

The officers also found a bag containing 113 live rifle rounds and 37 nine-millimeter pistol rounds in defendant's Fresno bedroom. At trial, an officer explained that the live rifle rounds are used in AK-47 assault rifles and the nine-millimeter rounds are commonly used in pistols. The officer also stated a rifle, pistol or revolver can be used to fire .22-caliber bullets, such as those used in the shooting. No .22-caliber ammunition or firearms were found in the Fresno house.

d. The Dodge Intrepid

When the investigating officers spoke with defendant, he told them he drove his mother's Dodge Intrepid and that, a few days earlier, the car had been towed. The officers located the Intrepid at a tow yard, where it was searched and photographed. During the search, the officers found two live rounds in the trunk, which were the "same kind" as those found in defendant's Fresno bedroom. The car was consistent with Mr. Magana's description of the car used in the shooting.

4. Co-Defendant's Stories

Co-defendant testified at trial on his own behalf[1] and denied any involvement in, or direct knowledge of, the shooting. His testimony differed dramatically from previous statements he had made in interviews with detectives as well as with the prosecution, both of which were recorded and played for the juries.

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[1] Defendant did not present any witnesses.

a. Stationhouse interview

Some time after the shooting, detectives picked co-defendant up from school and interviewed him at the station. In his stationhouse interview, co-defendant initially denied involvement in the shooting. He said he had heard defendant shot, from his car, a Compton Barrios Segundos gang member. He also stated defendant had a .22-caliber rifle that he carries under his car seat.

Eventually, co-defendant stated he was in the car with defendant when defendant shot at the men on the sidewalk, but he "didn't know it was going to happen" and was "shocked" by defendant's actions. Co-defendant said defendant was driving him home in a grey car (he did not know what kind of car it was), when they saw the others on the sidewalk. Defendant asked if co-defendant knew them, and co-defendant said he thought they were from Compton Barrios Segundos. At that point, defendant took his gun from under his seat and started shooting at them.

b. Courthouse interview

About one month before the preliminary hearing, the prosecution together with detectives interviewed co-defendant at the courthouse while his counsel was present. Co-defendant's courthouse story was similar to his stationhouse story. He said defendant was driving him home in a grey car when they saw "two guys walking" and defendant asked if co-defendant knew them. Co-defendant said he did not know them. But, when the people on the sidewalk saw defendant's car, they knew it was defendant and started "throwing little gang signs" indicating they were from Compton Barrios Segundos. One of the Segundos members, who co-defendant later identified as Ivan Torres, lifted his shirt revealing a black gun in his waistband. Defendant stopped the car and took his gun from under his seat. When Ivan saw the car stop, he put his shirt down and did not move, leaving the gun in his waistband. At that point, defendant shot at the men six or seven times with a .22-caliber rifle. None of the Segundos members shot back at defendant or co-defendant. Ivan never pulled the gun from his waistband. Co-defendant said he did not know defendant had a gun and was surprised when he started shooting. Co-defendant thought the Segundos member who had been shot was the one with the gun in his

waistband, but also indicated that, the night of the shooting, he was not sure if anyone actually had been shot.

After the shooting, co-defendant asked defendant to drive him to Mr. Torres's house. Co-defendant spoke with Mr. Torres outside his home, while defendant waited in the car.

c. Trial

At trial co-defendant stated that what he had previously told detectives and the prosecution about defendant's and his own involvement in the shooting was not true. He said he lied in an attempt to save his own skin and to tell the detectives what they wanted to hear. He said that, despite his conflicting statements, the truth was he was not involved and he did not know whether defendant was involved. He said he was not with defendant at all the day of the shooting, and only heard about it afterward from someone else.

5. Jury Instructions and Closing Statements

Before the trial court instructed the jury, trial counsel requested a manslaughter instruction based on a theory of imperfect self-defense. Trial counsel did not request an instruction on perfect self-defense, which is an affirmative defense. The court refused to instruct the jury on imperfect self-defense and did not sua sponte instruct the jury on perfect self-defense.

The case was aggressively tried and argued. Both the prosecutor and defense counsel objected at various points during the other's closing statements to the jury. We discuss this in detail below.

6. The Verdict and Sentence

The jury found defendant guilty of first degree murder and attempted premeditated murder and found all special allegations true.

As to count one, the trial court sentenced defendant to 25 years to life in prison, plus another 25 years to life for the firearm enhancement, for a total of 50 years to life. On count two, the court ordered life in prison, plus 15 years to life for the gang enhancement and 25 years to life for the firearm enhancement, for a total of 40 years to

life. The court ordered the sentence on count two to run concurrently. In addition to various other fines, the court ordered defendant to pay $7,322.29 to the State Victim Compensation Board in restitution for the victim's funeral expenses.

Discussion

1. Self-Defense

Defendant argues the trial court erred in not instructing the jury sua sponte on self-defense and in refusing trial counsel's request, based on the theory of imperfect self-defense, for an instruction on the lesser included offense of voluntary manslaughter. We are not persuaded.

a. Self-defense

Defendant claims the trial court erred in not instructing the jury sua sponte on the affirmative defense of self-defense. A trial court's duty to instruct sua sponte on a particular defense is "limited, arising 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Barton* (1995) 12 Cal.4th 186, 195.) In particular, a trial court is required to instruct the jury on self-defense when substantial evidence supports the theory the defendant actually and reasonably believed he needed to defend himself against an imminent danger of death or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The defendant's belief must be objectively reasonable. (*Id.* at pp. 1082-1083.) Reasonableness in this context is judged from the point of view of a reasonable person in defendant's position. (*Id.* at p. 1083.) "'To justify an act of self-defense . . . , the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation], and '. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065.)

b. Imperfect self-defense and voluntary manslaughter

Defendant also claims the trial court erred in refusing trial counsel's request to instruct on the lesser included offense of voluntary manslaughter. A trial court is required to instruct "on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)[2]

Defendant asserts an instruction on voluntary manslaughter was warranted based on the theory of imperfect self-defense. Imperfect self-defense applies when a person kills with an actual, but unreasonable, belief that it is necessary to defend himself against "'imminent peril to life or great bodily injury.'" (*In re Christian S.* (1994) 7 Cal.4th 768, 773.) Such a belief "'negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter.'" (*Ibid.*) "'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. """[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*."""" (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "[W]hen a defendant, acting with conscious disregard for life, unintentionally kills in unreasonable self-defense, the killing is voluntary, not involuntary, manslaughter." (*People v. Blakely* (2000) 23 Cal.4th 82, 88-89.)

Thus, when the elements of imperfect self-defense are met, a defendant is not guilty of murder, but instead may be guilty of the lesser included offense of voluntary manslaughter.

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[2] In *People v. Breverman*, our Supreme Court addressed the trial court's sua sponte duty to instruct on a lesser included offense. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.) The principles set forth in *Breverman* are applicable here where defendant requested an instruction on a lesser included offense and the trial court refused to give it. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 611.)

c. Application

We independently review the trial court's failure to instruct on defenses and lesser included offenses. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

We have reviewed the record and conclude substantial evidence does not support a finding of either self-defense or voluntary manslaughter. Defendant argues that, because Ivan Torres "flashed" a gun as defendant drove down the street, defendant acted in self-defense when he pulled over, spoke or argued with the victims, then, when no one was even holding a gun, pulled out his own gun and shot multiple times at them. First, there is no evidence defendant saw Ivan's gun. Second, assuming defendant saw the gun, there was no imminent danger to his life or imminent threat of great bodily injury. (See *People v. Manriquez*, *supra*, 37 Cal.4th at p. 581.) Defendant was in control of the car he was driving and chose to drive closer to the rival gang members walking on the sidewalk, to stop the car, to talk or argue with them, and then—even when Ivan "froze" and was no longer revealing his gun—to reach for his own gun and start shooting. This evidence does not meet the requirements for an instruction on either self-defense or voluntary manslaughter.

Accordingly, the trial court did not err in failing to instruct the jury on either the affirmative defense of self-defense or the lesser included offense of voluntary manslaughter.

2. Failure to Conduct a *Marsden* Hearing

Defendant also argues that, at the sentencing hearing, the trial court erred in failing to hold a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118). Defendant claims the judgment must be reversed and the case remanded so that the trial court may hold a post-conviction *Marsden* hearing. Respondent disagrees, arguing defendant never requested a substitute attorney and, therefore, never triggered the trial court's *Marsden* obligations. We agree with respondent.

a. Background

At the start of the sentencing hearing, appointed defense counsel, Robert Cortes, Alternate Public Defender, argued four grounds in support of a motion for new trial.

After both sides had argued the motion, defendant spoke with his attorney, who then advised the court that defendant also wanted to raise ineffective assistance of counsel as an additional ground for a new trial. The entire discussion on this point was as follows:

"[DEFENSE COUNSEL]: What Mr. Ariza is basically saying to me is that—I'm speaking on the record now. He is claiming that there—that I was—that he received ineffective assistance of counsel. Now at this point, I could declare a conflict. And you can appoint a lawyer to review my entire file and the transcript.

"The basis for his motion, one, is that he wanted to testify but he didn't on my advice. Two, he indicated that he and his mother provided me with documentation to prove that the car that was photographed was, in fact, not the car that was owned by the family. And that the car that—proof that it did not have tinted windows. I informed Mr. Ariza that I thought that was a minor issue at best. And I did not pursue it because I didn't think it was necessary.

"THE COURT: Okay. Let me address that issue. The court is not going to go over the facts of the case in this hearing.

"As to your claim of ineffective assistance of counsel, the fact that you did not testify, unless you were prevented from testifying by your attorney or the court, and I didn't hear any claim that that was the case.

"And on the record I'll just ask at this time: [Defense counsel], did your client, Mr. Ariza insist on testifying?

"[DEFENSE COUNSEL]: Mr. Ariza raised the issue of him testifying shortly after the co-defendant testified. I told him that in my opinion I didn't think it was necessary, that there was sufficient ambiguity in the record in what was said. I didn't think he should testify. At that point, he stopped.

"THE COURT: And you didn't ignore his request?

"[DEFENSE COUNSEL]: I addressed it. I talked to him about it, and I told him my opinion. He acquiesced.

"THE COURT: Okay.

"[DEFENSE COUNSEL]: The ineffective assistance of counsel could be raised on appeal.

"THE COURT: Appeal or some hab[ea]s corpus. At this time at this stage of the proceedings, the court is denying that motion which would be a motion based on ineffective assistance of counsel. That is denied at this time. You have an opportunity to raise that and other issues on appeal.

"With the remaining issues and concerns that were raised for the new trial, the court is denying on each of the points raised. That's denied."

b. Analysis

As the quoted colloquy reveals, there was no request for substitute counsel. Neither defendant nor his trial counsel requested that trial counsel be discharged and a new, substitute attorney be appointed.

Thus, the question becomes whether, standing alone, defendant's request for a new trial based on alleged ineffective assistance of counsel was sufficient to trigger a *Marsden* hearing. The courts of appeal disagree on this point. The First and Fifth Districts have held a motion for new trial based on ineffective assistance of counsel is sufficient to trigger the trial court's duty to hold a *Marsden* hearing. (*People v. Reed* (2010) 183 Cal.App.4th 1137; *People v. Mendez* (2008) 161 Cal.App.4th 1362; *People v. Mejia* (2008) 159 Cal.App.4th 1081; *People v. Eastman* (2007) 146 Cal.App.4th 688; *People v. Stewart* (1985) 171 Cal.App.3d 388, disapproved on another ground in *People v. Smith* (1993) 6 Cal.4th 684, 696.) On the other hand, the Third District has held a motion for new trial based on ineffective assistance of counsel is insufficient on its own to trigger a *Marsden* hearing. (*People v. Richardson* (2009) 171 Cal.App.4th 479 (*Richardson*).)

We conclude the Third District's reasoning in *Richardson* is more persuasive. In particular, in reaching its conclusion, *Richardson* relies on our Supreme Court's decision in *People v. Dickey* (2005) 35 Cal.4th 884 (*Dickey*), which was decided after the First District's opinion in *Stewart* and on which the Fifth District does not rely (or cite) in either *Mendez* or *Eastman*. Although the First District in *Reed* acknowledges *Dickey*, the court simply states without analysis "[w]e would . . . respectfully disagree with our Third

District colleagues' conclusion that *Mendez* is inconsistent with the Supreme Court's holding in *Dickey*." (*Reed, supra,* 183 Cal.App.4th at p. 1148.) As we discuss below, however, the First and Fifth Districts' reasoning does in fact appear inconsistent with the Supreme Court's reasoning in *Dickey*.

In *Dickey,* following the guilt phase but before the penalty phase of a capital murder case, the defendant moved for appointment of separate counsel to prepare a motion for new trial. The anticipated motion for new trial was likely to include allegations that defense counsel was ineffective during the guilt phase. (*Dickey, supra,* 35 Cal.4th at p. 918.) The court appointed separate counsel to consider the defendant's request for new trial based in part on ineffective assistance of counsel. (*Id.* at p. 920.) On appeal, the defendant argued he had sought substitute counsel to represent him during the penalty phase of the case and the trial court had erred in not conducting the required *Marsden* hearing. (*Id.* at p. 918.) Our Supreme Court concluded there was no *Marsden* error. "'"'Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.'" [Citations.]' [Citation.] Defendant did *not* clearly indicate he wanted substitute counsel appointed for the penalty phase. To the extent he made his wishes known, he wanted to use counsel's assertedly incompetent performance in the guilt phase as one of the bases of a motion for new trial, and he wanted to have separate counsel appointed to represent him in the preparation of such a motion. As his expressed wishes were honored, he has no grounds for complaint now." (*Id.* at pp. 920-921.)

In *Richardson,* after trial but before sentencing, the defendant submitted letters to the trial court requesting a new trial based in part on alleged ineffective assistance of counsel. (*Richardson, supra,* 171 Cal.App.4th at p. 482.) Without discharging defendant's trial counsel, the trial court appointed separate counsel to investigate the defendant's allegations. (*Id.* at p. 483.) On appeal, the defendant argued unsuccessfully that his letters to the court triggered the court's duty to conduct a *Marsden* hearing. Relying on the holding and analysis in *Dickey*, the Third District disagreed. "While the law does not require that defendant use the word '*Marsden*' to request substitute counsel,

we will not find error on the part of the trial court for failure to conduct a *Marsden* hearing in the absence of evidence that defendant made his desire for appointment of new counsel known to the court. (*Dickey*, *supra*, 35 Cal.4th at pp. 920-921.)" (*Richardson*, *supra*, 171 Cal.App.4th at p. 484.) The court distinguished the *Eastman* and *Mendez* cases, stating "neither of those cases discusses *Dickey* or the rule of law contained therein, and we respectfully decline to follow them." (*Id.* at p. 485.)

We recognize this case differs from *Dickey* and *Richardson* in that, in those cases, the trial court appointed separate counsel to prepare the new trial motion based on ineffective assistance of counsel. Here, the trial court did not appoint a separate attorney to prepare a new trial motion. But this distinction does not change our conclusion.

The relevant facts in both *Dickey* and *Richardson* are similar if not identical to those presented here. In both cases, as here, the defendant did not request *substitute* counsel, rather he indicated a desire to file a new trial motion based at least in part on ineffective assistance of counsel and requested, or suggested the idea of, the appointment of *separate* counsel for that purpose alone. No *Marsden* hearing was conducted in those cases. *Dickey* and *Richardson* found no *Marsden* error under this fact pattern. Although the defendants all sought to file a new trial motion based in part on ineffective assistance of counsel, the trial court's *Marsden* obligations were not triggered.

The fact that the trial courts in those cases both appointed attorneys for the sole purpose of investigating and preparing a motion based on ineffective assistance of counsel does not satisfy or alter the courts' *Marsden* obligations if and when a *Marsden* hearing is requested or otherwise triggered. In any event, neither *Dickey* nor *Richardson* indicates that the appointment of counsel for the sole purpose of presenting a motion based on ineffective assistance of counsel is necessary or significant to their holdings.

Thus, we conclude the trial court was not obligated to hold a *Marsden* hearing here.

3. Ammunition Evidence

Defendant argues the trial court erred in admitting evidence of ammunition found in defendant's bedroom in Fresno (the "Fresno ammunition"). According to defendant, that evidence was both irrelevant and unduly prejudicial because the Fresno ammunition was not compatible with the gun used in the shooting, namely, a .22-caliber firearm. Rather, the Fresno ammunition was for an AK-47 assault rifle and a nine-millimeter pistol. Defendant also claims that, by admitting the Fresno ammunition evidence, the trial court denied him his due process and right to a fair trial.

As an initial matter, and as respondent correctly points out, neither defendant nor his co-defendant objected to most of the testimony concerning the Fresno ammunition, and no one objected when samples of the ammunition were passed out to the jury for viewing. Before any objection was made, the sheriff's deputy involved in the search of the Fresno house had already testified about the discovery of the Fresno ammunition and what types of firearms use that ammunition. And the jury had already viewed samples of the Fresno ammunition. Only then did co-defendant's counsel object—on relevance and prejudice grounds—to "*further* testimony regarding an AK-47 or the ammunition." (Emphasis added.) Defendant's counsel joined in that objection. The trial court allowed the evidence despite counsel's objections and refused to give a cautionary statement. Further evidence of the Fresno ammunition (i.e., after counsel objected) was cumulative of the unchallenged testimony.

Because defendant did not make a timely objection to the Fresno ammunition evidence, he cannot now claim error as to its admission. (Evid. Code, § 353, subd. (a); *People v. Boyette* (2002) 29 Cal.4th 381, 423-424.) Additionally, because the only objection below was based on relevance and prejudice, defendant cannot now claim for the first time that the trial court also violated his rights to due process and a fair trial. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1122.)

Assuming defendant did not waive his relevance and prejudice objection, however, we review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) The trial court has broad discretion

in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.) Our Supreme Court has explained that the term "prejudice" as used in Evidence Code section 352 refers to evidence that "'uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1998) 46 Cal.3d 612, 638.) An error in the admission or exclusion of evidence following an exercise of discretion under Evidence Code section 352 is tested for prejudice under the *Watson* harmless error test. (See *People v. Alcala* (1992) 4 Cal.4th 742, 790-791.) Under the *Watson* test, the trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

We conclude the trial court erred in admitting evidence of the Fresno ammunition. That evidence had very little effect on the issues and tended to evoke an emotional bias against defendant. Nonetheless, we also conclude the error was harmless. Not only did properly admitted evidence show defendant was a member of a violent gang who drove around with a rifle under his seat, but co-defendant identified defendant as the shooter while other witness accounts supported that finding. Thus, it was not reasonably probable that defendant would have achieved a more favorable result had the Fresno ammunition been excluded.

4. Prosecutor's Closing

Defendant argues that, during rebuttal closing remarks to the jury, the prosecutor improperly maligned defense counsel, causing irreparable prejudice and denying defendant his rights to due process and a fair trial. We disagree.

Defense counsel objected twice to statements the prosecutor made during her rebuttal closing statements to the jury. First, after both defendant's counsel and co-defendant's counsel made their closing statements, the prosecutor began her rebuttal statement as follows: "Good morning, ladies and gentlemen. It takes a certain kind of personality to be a defense attorney. It boggles the mind that that type of personality, to do their job, that those defense attorneys are able to sleep with themself [sic] at night. It

takes a certain type of personality." Counsel for co-defendant successfully objected to these statements. The trial court agreed the statements questioned whether all defense attorneys have any conscience at all, sustained the objection and admonished the jury not to consider the statements because they impugned defense attorneys as a whole.

Second, after the prosecutor concluded her rebuttal remarks with respect to defendant, and outside the presence of the jury, defendant's counsel complained that, despite the court's earlier admonition, the prosecutor continued to disparage defense tactics. In his view, the prosecutor had "crossed the line" from acceptable to unacceptable statements to the jury. He objected to the prosecutor's alleged suggestions that the defense attorneys had fabricated a defense. Counsel asked the court to admonish the prosecutor not to imply the defense was fabricated. The prosecutor argued she was not implying the defense was fabricated, but rather was pointing out what the evidence at trial showed and arguing from that. The trial judge overruled the objection, explaining he had already sustained the earlier objection and had admonished the jury that the integrity of the defense was not at issue. The court did caution the prosecutor, however, against using the word "sly" in characterizing defendant's attorney.

Although neither co-defendant's counsel nor defendant's counsel made any other objections during the prosecutor's closing statements, defendant now argues specific statements the prosecutor made in rebuttal were improper and warrant reversal. In particular, defendant objects to the following statements:

- "Defense counsel's job – not these esteem [sic] the lawyers, but defense attorneys' jobs are, one, to confuse the witnesses as we saw here; two, manipulate the evidence as we saw here; three, frustrate the process as we saw here; four, attack the D.A."
- "Finally, by any means necessary it is the defense attorney's job to pull the wool over of [sic] the jurors eyes so that we all feel like we are Alice in Wonderland."
- "Mr. Cortes [defendant's trial counsel], defense attorney, what we saw here—the demonstration what we saw here, the asking of the questions of the various witnesses reminds me of a family member or a friend that we all know loves to

hear themselves [sic] talk. Loves to hear themselves [sic] talk to the point that they don't even listen to what they see. They are so convinced that everything they say is the gospel that they disregard all the evidence, cannot admit when a mistake on their part has been made. We saw all of this, ladies and gentlemen."

- Referring to defendant's trial counsel as a "sly one" who made a "sly move" and would take "any means necessary to get [his] client off."

Because defendant failed to object contemporaneously to these statements at trial, and an admonition would have cured any harm, his objections on appeal are forfeited. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154; *People v. Bemore* (2000) 22 Cal.4th 809, 845-846.)

Assuming defendant's objections were properly preserved, however, we conclude the prosecutor's remarks were not improper. "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.) And, when addressing a claim of prosecutorial misconduct based on the denigration of opposing counsel, "we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter." (*People v. Frye* (1998) 18 Cal.4th 894, 978.)

Our Supreme Court has delineated what a prosecutor can and cannot say in statements to the jury. For example, a prosecutor may not state or imply defense counsel fabricated a defense or sought to deceive the jury. (E.g., *People v. Zambrano, supra,* 41 Cal.4th at p. 1154; *People v. Stitely* (2005) 35 Cal.4th 514, 560; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) Similarly, a prosecutor may not personally attack or denigrate defense counsel or imply defense counsel is dishonest. (E.g., *People v. Bemore, supra,* 22 Cal.4th at p. 847; *People v. Welch* (1999) 20 Cal.4th 701, 752; *People v. Frye, supra,* 18 Cal.4th at p. 978; *People v. Bell* (1989) 49 Cal.3d 502, 538.) And a

prosecutor may not portray defense counsel as the villain in the case. (E.g., *People v. Thompson* (1988) 45 Cal.3d 86, 112.)

On the other hand, a prosecutor enjoys a "broad scope of permissible comment" (*People v. Dykes*, *supra*, 46 Cal.4th at p. 772) and may "vigorously argue" her case (*People v. Thompson*, *supra*, 45 Cal.3d at p. 112). In contrast to denigrating defense counsel, a prosecutor may use "pungent" (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1154) or "colorful" (*People v. Stitely*, *supra*, 35 Cal.4th at p. 560) language to denigrate the defense case. (*People v. Valencia* (2008) 43 Cal.4th 268, 305 [prosecutor properly and "vigorously denigrated the defense case"]; *People v. Stitely*, *supra*, 35 Cal.4th at pp. 559-560 [acceptable for prosecutor to warn jurors not to "'fall for'" defense counsel's "'ridiculous'" and "'outrageous'" attempt to allow defendant to "'walk free'" and to argue that defense counsel's line of reasoning was a "'legal smoke screen'"].) It is also well established that a prosecutor may state defense counsel seeks to confuse the issues. (E.g., *People v. Cummings*, *supra*, 4 Cal.4th at p. 1302 [acceptable to argue defense counsel was attempting to hide the truth and to use "'ink from the octopus'" metaphor]; *People v. Marquez* (1992) 1 Cal.4th 553, 575-576 [acceptable to argue defense counsel presented a "'heavy, heavy smokescreen . . . to hide the truth from you'"]; *People v. Breaux* (1991) 1 Cal.4th 281, 306-307 [acceptable to argue law students are taught to create confusion when neither the law nor the facts are on their side, because confusion benefits the defense]; *People v. Bell*, supra, 49 Cal.3d at p. 538 [acceptable to argue defense counsel's job is "'to confuse,'" "'to throw sand in your eyes'" and "'to get his man off,'" and that counsel "'does a good job of it'"].) Of course, the prosecutor can and should comment on and draw reasonable inferences from the evidence. (*People v. Bemore*, supra, 22 Cal.4th at p. 846.)

Under the case law outlined above, the prosecutor's statements to the jury here "fall within the broad scope of permissible comment." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 772.) The complained-of comments primarily fall within the permissible category of stating defense counsel sought to confuse the issues—e.g., claiming defense counsel sought to "confuse," to "manipulate," to "frustrate," "to pull the wool over

. . . the jurors' eyes," and to make everyone "feel like we are Alice in Wonderland." The prosecutor also stated defense counsel loved to hear himself talk and would not listen to or would disregard the evidence. These brief comments do not imply dishonesty or impugn defense counsel's integrity. Rather, they prefaced the prosecutor's detailed discussion of the evidence and of various points during trial when defense counsel sought to cast doubt on a witness's testimony or on the facts.

Finally, although perhaps closest to the impermissible line, the prosecutor's brief description of defense counsel as "sly" and as someone who would use "any means necessary" was tied to a discussion of the evidence at trial, and, "especially when viewed in context, hardly so inflammatory as to distract the jury from a thorough and reasoned evaluation of the evidence." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 61.) Indeed, when all of the challenged statements are read in context and in relation to defense counsel's own closing statements (during which, for example, counsel used a Wizard of Oz analogy, implying the prosecutor had been dishonest or at least inaccurate,[3] and stated the prosecutor "contort[ed] facts"), it is evident the prosecutor's comments were not improper and were a fair response to defendant's closing. (*People v. Frye*, *supra*, 18 Cal.4th at p. 978.)

5. Restitution Order

Finally, defendant argues that, although the court's minutes and the abstract of judgment reflect otherwise, the trial court never entered a $7,322.29 restitution order for the victim's funeral expenses or, if the court did enter such an order, it must be stricken. Defendant claims the court postponed entering the restitution order until the prosecutor filed and served receipts supporting the restitution amount, which the prosecutor never

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[3] Defense counsel's Wizard of Oz analogy was: "But one of the things a defense attorney has to do is—remember in the Wizard of Oz, Dorothy comes with the Scarecrow and the Cowardly Lion and the Tin Man, and the Wizard is there talking, and it's all majestic and stuff? And Toto is running around, and Toto goes behind the curtain? The Wizard, the all powerful Wizard. What a defense attorney does is try to pull back the curtain to reveal that the Wizard is really a man just like everybody else with the same foibles, with the same ability to make errors."

did. In the alternative, if the court in fact entered the restitution order, defendant argues it is unsupported and must be stricken. We conclude that, assuming the order was entered, it must be vacated because it does not comport with the governing statute, Penal Code section 1202.4, subdivision (f)(4) .

As an initial matter, it is unclear whether the trial court entered the restitution order for funeral expenses. At the sentencing hearing, the court stated "[t]he court has signed a restitution order for a total of $7,322.29 that is ordered for restitution. And it's to be with an interest of 10 percent." Immediately following that, however, the court and counsel discussed the basis for the amount of restitution. Although everyone agreed the amount appeared to represent funeral expenses paid by the State Victim Compensation Board to the family of Luis Rodriguez, no one was sure how the $7,322.29 figure was calculated. No one had supporting receipts. The prosecutor simply stated "[t]hat's what I was provided by the D.A.'s office" and then later offered to "inquire and call." Addressing the prosecutor, the court stated "[i]f there's a supplemental set of receipts to be provided they can be filed with the court and also copied to [defense counsel]." This implied the court would wait for supporting documents before entering the order. But, the minutes of the court and the abstract of judgment both state the restitution order for funeral expenses was entered. Thus, it is unclear whether the court entered the order or postponed entry of the order pending its receipt of supporting documentation.

Assuming the order was entered, however, we conclude it must be vacated because it violates Penal Code section 1202.4 (section 1202.4). We review a restitution order for an abuse of discretion. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) When there is a factual and rational basis for the restitution amount, there is no abuse of discretion. (*Ibid.*) But a restitution order "resting upon a '"demonstrable error of law"' constitutes an abuse of the court's discretion." (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49.)

Subdivision (f)(4) of section 1202.4 governs the restitution order here because the Restitution Fund provided assistance on behalf of the victim, Luis Rodriguez. Under section 1202.4, subdivision (f)(4)(B), the amount of assistance provided by the board

must be established by copies of the bills submitted to the board showing the amount the board paid and by a declaration signed under penalty of perjury by a custodian of records indicating the board had paid the bills. "The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the California Victim Compensation and Government Claims Board reflecting the amount paid by the board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Certified copies of these bills provided by the board and redacted to protect the privacy and safety of the victim or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that those bills were submitted to and were paid by the board, shall be sufficient to meet this requirement." (§ 1202.4, subd. (f)(4)(B).)

It is undisputed the prosecution submitted neither certified copies of bills nor any declaration signed under penalty of perjury by any custodian of records showing the board paid the bills. Thus, the restitution order lacks the necessary evidentiary support and must be vacated. The cases relied on by respondent do not apply because none addresses restitution awards governed by section 1202.4, subdivision (f)(4).

Although defendant asks this court simply to reverse or strike the restitution order, the appropriate remedy is to remand the case to the trial court for a new restitution hearing. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 996.)

6. Sentence on Count Two

As respondent correctly points out, the sentence on count two is unauthorized and must be modified. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.) The correct sentence on count two is a life term with a minimum parole eligibility period of 15 years (Pen. Code, §§ 186.22, subd. (b)(5); 664, subd. (a)) and a 25 years to life enhancement (Pen. Code, § 12022.53, subd. (d)).

Disposition

The judgment is reversed in part and affirmed in part. The restitution order requiring defendant to pay $7,322.29 to the State Victim Compensation Board is vacated and the matter is remanded to the trial court for a new restitution hearing. The sentence on count two is amended to reflect a life term with a minimum parole eligibility period of 15 years and a 25-years-to-life enhancement. The trial court is directed to amend the abstract of judgment accordingly and to forward the amended abstract to the appropriate authorities. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.